



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 17, 1998

Ms. Joni Vollman
Assistant General Counsel
Office of the District Attorney
Harris County
201 Fannin, Suite 200
Houston, Texas 77002-1901

OR98-2230

Dear Ms. Vollman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 118115.

The Harris County District Attorney (the "district attorney") received two requests for "all files, records and any other documents in the possession of the Harris County District Attorney's Office pertaining to arrests, investigations and/or trials regarding certain cases. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample information.¹

Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

¹We assume that the "representative samples" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

To show that section 552.103 is applicable, the district attorney's office must demonstrate that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You indicate that the case is currently in litigation as the case is at "the direct appeal stage (Sheppard) and the writ of habeas corpus stage (Dickerson)." Although you assert that the information comes within the section 552.103 exception you only ask that the submitted files be considered and not the "entirety of the state's litigation file." We have reviewed the information and arguments and we conclude that the district attorney's office may withhold the information in Exhibit A pursuant to section 552.103 of the Government Code until such time that all litigation pertaining to the criminal charges has otherwise concluded. Of course, once information has been obtained by all parties to the litigation through discovery or otherwise, or the litigation has ended, no section 552.103 interest exists with respect to that information.² Open Records Decision Nos. 349 (1982), 320 (1982). As we resolve this matter pertaining to Exhibit A under section 552.103, we need not address your additional arguments. We caution however, that some of the information may be confidential by law. Thus, if the district attorney's office receives a request in the future, at a time when litigation is no longer reasonable anticipated or pending, the district attorney's office should seek a ruling from this office before releasing any of the request information. See Govt code 552.352 (distribution of confidential information may constitute criminal offense).

We note that section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

Next we review Exhibit B which contains criminal history information.³ We observe that the dissemination of criminal history record information ("CHRI") obtained from the NCIC network is limited by federal law. See 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the CHRI except

²Additionally, we note that section 552.103 may not be invoked to except front page offense report information, even where it is relevant to pending litigation, if the information has already been made available to the defendant in criminal litigation. Thus, you must release front page information. Open Records Decision 127(1976).

³We assume that the "representative samples" of records contained within Exhibit B, and submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. Furthermore, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by Government Code chapter 411, subchapter F.⁴

Exhibit C contains information constituting subpoenas issued by the Grand Jury which are not filed with the court but are kept on its behalf by the district attorney. Tex. Code Crim. Proc. Art. 20.02(a). Article 20.02 of the Code of Criminal Procedure makes confidential information revealing the substance of grand jury deliberations. Further, this office has concluded that the grand jury is an extension of the judiciary for purposes of the Open Records Act. Open Records Decision Nos. 433 (1986), 411 (1984). Information held by a grand jury, therefore, is not itself subject to the Open Records Act. When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information held or collected by the agent is within the grand jury's constructive possession. Open Records Decision No. 513 (1988). Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury's constructive possession. You need not release information obtained pursuant to grand jury subpoena contained within Exhibit C under the Open Records Act.

The material within Exhibit D and Exhibit E requires an examination of subsection (a) of section 261.201 of the Family Code which provides:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with . . . [the Family] code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under . . . chapter [261 of the Family Code] and the identity of the person making the report; and

⁴Individuals may, however, gain access to their own criminal history and arrest records. Attorney General Opinion MW-95 (1979). The Code of Federal Regulations requires criminal justice agencies that utilize the services of Department of Justice criminal history record information systems to establish procedures for any individual to gain access to and review his criminal history record information for completeness and accuracy, provided that the individual pay any required processing fee and verify his identity by fingerprint comparison. See 28 C.F.R. § 20.34(a). We further note that it is the policy of the Department of Public Safety, which administers the NCIC and maintains the TCIC, to provide any individual with access to his criminal history record on file, utilizing the procedure as outlined in section 27.1 of title 37 of the Texas Administrative Code.

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under . . . chapter [261 of the Family Code] or in providing services as a result of an investigation.

We have reviewed the information in exhibits D and E, which consists of "reports, records, communications, and working papers used or developed" in an investigation made under chapter 261 of the Family Code. Thus, the information in the requested file may be disclosed only for purposes consistent with the Family Code and applicable federal or state law or under rules adopted by the agency that investigated the allegation.⁵ Since you have not informed this office that Harris County has adopted any rules providing for release of this information, we conclude that the information at issue within Exhibits D and E is confidential and may not be disclosed.⁶

Exhibit F contains phone messages from police officers containing their pager numbers and you assert that section 552.117 excepts the pager numbers from disclosure. Section 552.117 provide that information is excepted from the requirements of section 552.021 if it is information that relates to the home address, home telephone number or social security number as a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under section 52.212, Education Code. Whether the public has a legitimate interest in such information, however, must be determined on a case-by-case basis. *Id* at 4; *see also* Open Records Decision Nos. 600 (1992), 545 (1990). Additionally, we also observe that privacy does not protect the cellular mobile phone numbers of public officials and employees. Open Records Decision No. 506 (1988). The pager numbers are not home telephone numbers and thus the pager numbers contained within Exhibit F must be released.

Next we observe that section 552.101 also excepts from required public disclosure information that is considered confidential by law a right of privacy. Exhibit G contains letters addressed to the district attorney and to his assistants handling the capital murder cases and contain individual sentiments regarding the murder victim and the defendant. You suggest that disclosure of the requested information would violate, we presume, the

⁵We note that the file at issue also contains records of the Department of Protective and Regulatory Services (the "department"). Section 261.201(f) provides that the department, upon request and subject to its own rules:

shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect information concerning the reported abuse or neglect that would otherwise be confidential under this section if the department has edited the information to protect the confidentiality of the identity of the person who made the report and any other person whose life or safety may be endangered by the disclosure.

⁶Since section 261.201(a) makes the information at issue confidential, we need not address your other arguments against disclosure.

decendent's family common-law right to privacy. Information may be withheld under section 552.101 in conjunction with common-law privacy only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We have marked a portion of a letter within Exhibit G which must be withheld under section 552.101. The remaining information in Exhibit G must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Janet J. Monteros
Assistant Attorney General
Open Records Division

JIM/nc

Ref.: ID# 118115

Enclosures: Submitted documents

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(w/o enclosures)